United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7047

ORIGINAL

To be argued by
HERMAN ODELL

In The

United States Court of Appeals

For The Second Circuit

SAMUEL KOPET,

Plaintiff-Appellant,

vs.

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS,

Defendants-Appellees.

B
P/S

BRIEF FOR DEFENDANTS-APPELLEES

HERMAN ODELL
Attorney for Defendants-Appellees
460 Park Avenue
New York, New York 10022
(212) 486-1700

JOHN F. ZULACK
NATHANIEL M. SOKOLSKI
Of Counsel

(8280) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

2

TABLE OF CONTENTS

Page

Table of Authorities.....i

Issues.....1

Statement of the Case.....1

Argument
Point I

The District Court Correctly Decided That No Defendant Was Liable For The Payment Of Plaintiff's Attorneys Fees.....4

TABLE OF AUTHORITIES

Cases

	Page
Grace v. Ludwig, 484 F.2d 1262 (2 Cir. 1973)	6
Hall v. Cole, 412 U.S. 1 (1973)	4,5
Kahan v. Rosenstiel, 424 F.2d 161 (3 Cir. 1970)	8
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)	4,5,6,7
F. D. Rich & Co. v. Industrial Lumber Co., 417 U.S. 116 (1973)	4
Sprague v. Taconic National Bank, 307 U.S. 161 (1939)	4
Trustees v. Greenough, 105 U.S. 527 (1881)	4

Statutes and Authorities

Federal Rules of Civil Procedure, Rule 23(b)(3)		3
New York Partnership Law		2
Securities Act of 1933		
Section 5	15 U.S.C. §77(e)	2
Section 12(1)	15 U.S.C. §77(L)(1)	2
Section 17	15 U.S.C. §77(q)	2
Securities Exchange Act of 1934		
Section 10(b)	15 U.S.C. §78(j)(b)	2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL KOPET,

Plaintiff-Appellant

-against- : Docket No. 75-7047

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS,

Defendants- Appellees.

APPELLEES' BRIEF

THE QUESTION PRESENTED

The question presented for review is whether the Court below correctly refused to shift to defendants the burden of paying any part of plaintiff's attorneys fees.

STATEMENT OF THE CASE

A brief statement of the undisputed facts, some of which were omitted in appellant's brief, will be helpful in deciding the question of law raised by this appeal. The defendants are Esquire Realty Company ("Esquire"), a limited partnership whose 350 limited partners in 1962 contributed

$2,185,000 to a real estate venture, and three of the four general partners of Esquire (Appendix 18a; page 4 of Affidavit of Stuart Wechsler, sworn to February 5, 1973, in support of Plaintiff's Motion for Class Action Determination and Summary Judgment).

By a letter dated November 1, 1971, Esquire offered to sell its limited partners a total of $200,000 of additional limited partnership interests in an amount that was pro-rated to the original capital contribution of each partner. The proceeds were to be used to refinance a maturing mortgage on one of its properties. The offer was accepted by 186 of the 350 limited partners who purchased $131,250 of additional interests (Appendix 43a, ¶33). Count I of the complaint alleged a violation of Sections 5 and 12 of the Securities Act of 1933 ("1933 Act") for the failure to register these interests with the Securities and Exchange Commission before sale (Appendix 7a-8a). Count III alleged a failure to register these interests with the Department of Law, State of New York (Appendix 10a). Count II alleged fraudulent acts in violation of Section 10(b) of the Securities Exchange Act of 1934 and Section 17 of the 1933 Act (Appendix 8a-10a). Counts IV and V alleged violations for the partnership agreement and the New York Partnership Law (Appendix 10a-11a).

Plaintiff moved for summary judgment on all five counts of the complaint and for a class action determination under FRCP 23(b)(3). Defendants moved to dismiss Counts IV and V for lack of pendent jurisdiction, conceded liability under Counts I and III and opposed summary judgment on Count II (Plaintiff's Motion for Class Action Determination and Summary Judgment and Defendants' Cross-Motion to Dismiss Counts IV and V). In its December 4, 1973 opinion, the Court: (a) on defendants' concession of liability, granted plaintiff summary judgment on Counts I and III (Appendix 24a); (b) denied summary judgment on Count II due to the existence of issues of facts as to damages, scienter and materiality (Appendix 26a-27a); (c) dismissed Counts IV and V on the ground that those common law counts were beyond its jurisdiction (Appendix 21a-22a); and (d) decided that Counts I, II and III could be maintained as a class action on behalf of 186 [of the 350] limited partners who purchased additional partnership interests (Appendix 22a-24a). Later, plaintiff voluntarily discontinued Count II (Appendix 57a).

ARGUMENT

Point I

THE DISTRICT COURT CORRECTLY DECIDED THAT NO DEFENDANT WAS LIABLE FOR THE PAYMENT OF PLAINTIFF'S ATTORNEYS FEES.

The plaintiff does not fall into any of the following exceptions to the so-called "American rule" which bars a successful litigant from recovering his attorneys' fees from the loser:

> When his opponent has acted in "bad faith, vexatiously, wantonly or for oppressive reasons." Hall v. Cole, 412 U.S. 1,5 (1973).

> A trustee of a fund or of property or a party recovering or preserving a fund or property may recover his attorney fees from the fund or property. Trustees v. Greenough, 105 U.S. 527,535-536 (1881); Sprague v. Taconic National Bank, 307 U.S. 161 (1939).

> Where there is no monetary recovery and where the successful litigant has conferred "a substantial benefit on members of an ascertainable class and ... the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the cost proportionately among them." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-395 (1970); F. D. Rich & Co. v. Industrial Lumber Co., 417 U.S. 116, 130 (1973).

Plaintiff says at page 20 of his brief that the general partners of Esquire should pay his fees because he claims they "acted in wanton disregard of the rights of

security holders" and cites Hall v. Cole, supra. While plaintiff's claim is unsubstantiated and untrue, it is not necessary to entertain his hyperbole in order to show that his legal point has no foundation under this exception to the American rule. At the outset of this case, all defendants conceded liability on Counts I and III, the only counts upon which plaintiff was successful (Appendix 24a, Appellant's brief pp. 5-6). Under no circumstances could any of the general partners be accused here of acting in "bad faith, vexatiously, wantonly or for oppressive reasons". Hall, supra, 412 U.S. at p. 5.

Plaintiff says that alternatively his counsel fees should be paid by Esquire because the services rendered have benefited all limited partners of Esquire and Esquire itself (Appellant's brief p. 22). One of the "benefits" he claims is that summary judgment under Count I "will encourage management to comply with the securities laws in the future" (Id. p. 23), citing Mills v. Electric Auto-Lite, 396 U.S. 375, where the Court sustained a partial summary judgment as to liability against a corporation for a defective proxy statement under the Securities Exchange Act of 1934. The Court ruled that even though

no monetary recovery was created, plaintiff's efforts in enforcing the statutory policy of fair and informed corporate suffrage rendered a substantial service to the corporation and its shareholders (Id. 396-397). Such were the "special circumstances" that would justify an award of attorneys fees to be paid by the corporation ". . . where a plaintiff has successfully maintained a suit, usually on behalf of a Class, that benefits a group of others in the same manner as himself. . . To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrichen the others unjustly at the plaintiff's expense" (Id. 391-392). This Court has said with respect to the "special "circumstances" in Mills justifying an award of counsel fees, "that the equitable basis in any event for such an award is the prevention of unjust enrichment." Grace v. Ludwig, 484 F.2d 1262, 1269 (1973).

Plaintiff's reliance on Mills is misplaced. Here, there was a monetary recovery from which plaintiff's attorneys fees, as allowed by the Court below, would be deducted from the amount recovered. To require the defendants rather than the Class to pay plaintiff's attorneys fees would create rather than prevent "unjust enrichment".

As the Court below found, this was a representative action brought on behalf of a Class consisting of only those of its 350 limited partners (186 persons), who purchased the additional

partnership interests in 1971; no action was brought on behalf of Esquire; and summary judgment was granted only to Class members awarding rescission to those who still owned their additional partnership interest or damages if they had sold their interest (Appendix 22 a, 59 - 60 a). Neither Esquire, the 164 limited partners of Esquire who did not purchase additional participations nor those members of the Class who "opt" out are benefited in the slightest by the recovery to be had by those members of the Class who request the benefits of the judgment. Thus Esquire and the non-class members who will receive no benefits whatsoever from the judgment will be forced to pay a large, if not the greatest part, of plaintiff's attorneys fees without receiving the slightest benefit for having done so. Under such circumstances, requiring the general partners or Esquire to pay these attorneys fees is hardly the kind of "award that will operate to spread the costs proportionately" among those upon whom the litigation has conferred a benefit as required by Mills, supra, 396 U.S. at 393-394 and by Grace, supra, 484 F.2d at 1269.

Moreover, the other of the so-called "benefits" which the plaintiff claims he obtained for the partnership, as opposed to the Class, relate to Counts IV and V of the complaint, which were

dismissed for lack of jurisdiction before the merit of those claims was established. The District Court properly rejected plaintiff's contention, reasserted here, that these counts created any benefits "for all the limited partners" of Esquire. Thus the Court said:

> "However, those benefits really are to be found in the counts which the court dismissed. Those counts were common law counts and not in any way pendent to the federal claims. Plaintiff seems to understand this when he says in his moving affidavit that 'the revelation of the illegal borrowings and the leasehold sale described above supplied the limited partners of Esquire with information sufficient to enable them to commence an action in the Supreme Court of the State of New York, New York County, on behalf of Esquire against the defendant general partners seeking, etc.' If the information developed is so useful to the members of the class, counsel should proceed in the Supreme Court and request an award of counsel fees there upon the successful conclusion of the litigation." (Appendix 60-61a)

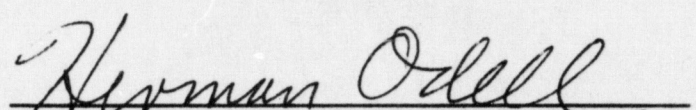
In Kahan v. Rosenstiel, 424 F. 2d 161, 167 (3rd Cir. 1970), the Court stated that for counsel fees to be awarded, a suit had to be "meritorious". It defined "meritorious" as capable of surviving a motion to dismiss. The same logic applies to Counts as well as suits. Plaintiff is entitled to counsel fees only for successfully prosecuting meritorious Counts in

this action.

CONCLUSION

The Court below was entirely correct in its decision that those members of the Class who are to receive the monetary recovery provided by the judgment in this action are the only persons who should bear the cost of plaintiff's attorneys fees. The order of the Court below should be affirmed in all respects with costs against plaintiff.

Respectfully Submitted,



HERMAN ODELL, Counsel for Defendants
Office and Post Office Address:
460 Park Avenue
New York, New York 10022
Telephone: (212) 486-1700

Of Counsel:

JOHN F. ZULACK
NATHANIEL M. SOKOLSKI

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL KOPET,

Plaintiff-Appellant,

against

ESQUIRE REALTY CO., etal.,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

JAMES STEELE *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

310 W. 146th Street, N.Y., N.Y.

That on the 2d *day of* July *1975 at* 122 E. 42d St., N.Y., N.Y.

deponent served the annexed Brief *upon*

Kass Goodkind Wechsler & Gerstein

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 2d

day of July *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977